In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 928

WILLIAM ANDERSON AND HAROLD MOFFETT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 403 F. 2d 451. The order of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1968. A petition for rehearing was denied on December 10, 1968. The petition for a writ

of certiorari was filed on January 10, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below properly held that the files and records of petitioners' cases adequately established that they were not entitled to a hearing on their allegation that the government knowingly used perjured testimony against them.

STATEMENT

Petitioners were separately indicted, tried, and convicted for different narcotics violations involving the sale, receipt and concealment of heroin (26 U.S.C. 4705(a); 21 U.S.C. 174).[1] Two of the counts on which petitioner Moffett was convicted involved an alleged sale of heroin on December 18, 1964. Two of the counts on which petitioner Anderson was tried (but on which he was acquitted) charged unlawful concealment and sale of heroin on December 17, 1964. Both petitioners, represented by different lawyers but prosecuted by the same government attorney, were tried in October 1965 before two different judges of the United States District Court for the Northern District of Illinois. The same federal narcotics agents —Tucker, Hill and Pringle—testified for the government at each trial. Petitioners' convictions were af-

[1] Moffett was sentenced to concurrent ten-year terms of imprisonment on four counts; Anderson was sentenced, as a second narcotics offender, to concurrent terms of fifteen years' imprisonment on two counts.

firmed. *United States* v. *Anderson*, 362 F. 2d 81 (C.A. 7), certiorari denied, 385 U.S. 840; *United States* v. *Moffett*, (C.A. 7) No. 15509, decided September 23, 1966, set forth at Pet. App. D.

Confined in the same prison, petitioners filed motions under 28 U.S.C. 2255, alleging that their convictions were the product of perjured testimony knowingly used by the prosecutor. Petitioners averred that the relevant facts were contained in the transcripts of the two trials, which they claimed showed serious inconsistencies and contradictions in the testimony of the federal agents. No hearing was requested at that time, although one was sought later. After studying the transcripts, the district court dismissed the motions without a hearing, finding that examination of the transcripts "does not reveal to this court any of the inconsistencies which each of the petitioners would read into the testimony" (Pet. App. B, 13). The court of appeals, in a thorough opinion, affirmed (Pet. App. A, 1-11).

Insofar as pertinent, the transcripts of the individual trials reveal that the following events took place on the night in question, December 17-18, 1964. About 5:00 p.m. on the 17th, federal narcotics agents Tucker, Hill, and Pringle met an informant, Pendleton, and drove to the Grand Prix Tavern in Chicago. Between 5:30 and 6:00 p.m. Tucker and the informant went into the Grand Prix Bar where, without having arranged to do so, they met petitioner Moffett (P. App. 3, 15; G. App. 14-15).[2] After talking with Moffett,

[2] "P. App.", the designation used by the government below, refers to petitioners' appendix in the court of appeals, con-

Tucker and Pendleton stayed at the Grand Prix for about ten minutes and then walked one-quarter block to the Subway Lounge, where Moffett rejoined them at about 6:10 p.m. (P. App. 15; G. App. 15-16). There Moffett agreed to sell heroin to Tucker and Pendleton. Tucker gave Moffett $105 in official funds and Moffett agreed to return to the Subway Lounge around 8:00 p.m. to conclude the transaction (G. App. 19-20). Tucker testified that he watched Moffett leave the Subway Lounge at 6:20 p.m. At that time, according to agents Hill and Pringle, who were maintaining a surveillance outside from their car, they followed Moffett to a point about three and one-half miles away where they lost his car in traffic (see Pet. 12-13).

After Moffett left the Subway Lounge, Tucker and Pendleton returned to the Grand Prix Bar where they talked briefly to petitioner Anderson. About 6:30 p.m. Anderson departed (G. App. 17). At about 7:45 p.m., Pendleton, with Tucker listening in, received a telephone call from Anderson instructing Pendleton to go alone to a parking lot a few blocks away (P. App. 4; G. App. 17-18). Tucker hid in the back seat of the car which Pendleton drove to the rendezvous and at about 7:55 p.m. saw petitioner Anderson hand a package containing heroin to Pendleton (P. App. 6; see G.

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taining excerpts from the transcripts of testimony at trial. A copy of this appendix is on file with the Clerk of this Court. "G. App." refers to the government's appendix in the court of appeals, also containing excerpts from the pertinent trial testimony. We are lodging a copy of this appendix with the Clerk.

App. 18).[3] Tucker and Pendleton, after a brief delay during which the agent performed a field test on the heroin (see Pet. 20), then returned to the Subway Lounge around 8:00 p.m. where they remained, except for a brief walk outside, until 2:30 a.m. on December 18, 1964, when they made a narcotics purchase from Moffett (G. App. 19-21).

ARGUMENT

1. Petitioners' allegations of perjury center upon their claim that agent Tucker testified at Moffett's trial that he spent the entire period between 6:10 and 8:00 or 9:00 at the Subway Lounge, and that he therefore could not have witnessed the narcotics transaction involving petitioner Anderson. This contention is based, however, on a misreading of the agent's testimony. As the court of appeals pointed out, contrary to the inferences petitioners wish to draw, Tucker's actual testimony does not contain the representation of uninterrupted presence at the Subway Lounge (Pet. App. A, 7-9). While Tucker's testimony at the Moffett trial did not make clear what he was doing between 6:20—when Moffett left the Lounge—and approximately 8:00 p.m., the failure to provide an exact log for that interval is readily understandable since, as the court below observed (Pet. App. A, 9), "to obtain a conviction for the Moffett sale it was of no moment where Tucker was during this period. The crucial facts upon which Moffett's conviction hinged

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[3] Surveilling agents put the time at about 8:00 p.m. (G. App. 18).

were the exchange of money and the promise to deliver heroin which occurred at 6:20 p.m. and the actual delivery of the narcotics at 2:30 a.m." In sum, both courts below correctly determined that the factual predicate for petitioners' claim of knowing use of perjured testimony—*i.e.*, a substantial inconsistency in the agents' testimony at the two trials—is wholly lacking on this record.

Nor is there any genuine hint of perjury in the corroborating testimony. At the Anderson trial, agents Hill and Pringle testified that they began to trail Anderson from the Grand Prix Tavern at 6:30 p.m. That time was ten minutes later than the time, according to their testimony at the Moffett trial, at which they had begun to follow Moffett for three and one-half miles (Pet. 22-23). Petitioners contend that it was physically impossible, given the times stated, for the agents to have followed both of them, and thus that the agents must have perjured themselves. The court below noted however (Pet. App. A, 10), that the agents could have made the seven mile return trip within the time indicated, since the route taken was almost entirely on an Expressway. But more importantly, the times given must be deemed only approximate. At neither trial was the precise minute at which some incident occurred of crucial significance, and it is quite understandable that, without any malevolence, the chronology provided by the agents was merely approximate. Furthermore, petitioners make an unwarranted assertion when they contend that the prosecutor must have been aware of this apparent overlapping of times and must have wilfully con-

cealed it. This charge turns on nothing more substantial than the fact that the same prosecutor tried both the Moffett and Anderson cases. But the trials were several weeks apart and it can hardly be said that the testimony at the two trials was of glaring inconsistency.[4]

2. It is clear, moreover, that there was no occasion to hold a hearing. The litmus test of petitioners' allegations—a test they failed—was a comparison of the transcripts of the trials themselves, as petitioners originally conceded. Since the files and records of

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[4] Petitioners also raise a claim—not advanced in their motion in the district court or treated by the court below—that the prosecutor violated the Jencks Act, 18 U.S.C. 3500, by failing to turn over at either trial, the agents' memoranda relating to their activities regarding the other defendant (Pet. 26-28). Since, as shown above, no significant inconsistency in the agents' recountings of their whereabouts and activities existed, any violation of the Jencks Act in this regard would not rise to the level of a constitutional infirmity in the convictions so as to be cognizable by motion under 28 U.S.C. 2255. See *United States* v. *Augenblick* (No. 45, this Term, decided January 14, 1969). Moreover, the Act deals only with production of a statement "which relates to the subject matter as to which the witness has testified", 18 U.S.C. 3500(b). It seems unlikely that an agent's report about one investigation "relates to the subject matter" of his testimony about a different transaction by another defendant at a separate trial.

Petitioners take out of context a point made by the court below when they argue that the court sustained leaving to the prosecutor the decision not to turn over producible statements if he thinks they will "confuse" the case (Pet. 27-28). The court below, however, was merely explaining why it was reasonable for the prosecutor not to ask agent Tucker on direct examination at the Moffett trial to describe his whereabouts during a time that properly appeared irrelevant (Pet. App. A, 9).

their cases conclusively showed they were entitled to no relief, the district court was authorized under 28 U.S.C. 2255 to reject their request for a hearing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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